No. 86-922

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1986

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO & VINCENT F. SERVELLO,

*Petitioners,*

*vs.*

ANACONDA-ERICSSON, INC., ERICSSON, INC., L.M. ERICSSON TELEPHONE COMPANY, NORDIC AMERICAN BANK, CITIBANK, N.A., PRICE-WATERHOUSE & CO., SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP. & STEPHEN R. COHEN,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the language of Rule 4(a)(4), F.R.A.P., which provides that a notice of appeal filed before disposition of a motion under Rule 59(e), Fed. R. Civ. P., "shall have no effect," is also applicable to a notice of appeal filed before disposition of a motion under Rule 60(b), Fed. R. Civ. P., when the latter motion — clearly designated as such — is made within ten days of the entry of judgment, even though there is no mention of Rule 60(b) in the text of Rule 4(a)(4)?

2. Whether the District Court had jurisdiction to enter a second "final" judgment for monetary sanctions against petitioners-attorneys after that court had already entered final judgment dismissing the case and an appeal had been taken from the latter judgment to the Court of Appeals?

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No.

In The

# Supreme Court of the United States

October Term, 1986

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO & VINCENT F. SERVELLO,

*Petitioners,*

*vs.*

ANACONDA-ERICSSON, INC., ERICSSON, INC., L.M. ERICSSON TELEPHONE COMPANY, NORDIC AMERICAN BANK, CITIBANK, N.A., PRICE-WATERHOUSE & CO., SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP. & STEPHEN R. COHEN,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners-attorneys respectfully pray that a writ of certiorari issue to review the order of a motion panel of the United States Court of Appeals for the Second Circuit dismissing petitioners-

attorneys' appeal from a judgment for monetary sanctions entered against them on March 7, 1986.

## OPINIONS BELOW

Relevant decisions of the District Court and the Court of Appeals are reported at 623 F. Supp. 176 (E.D.N.Y. 1985), *aff'd*, 794 F. 2d 843 (2d Cir. 1986). In addition, the District Court's memorandum and order, dated February 28, 1986, assessing the amount of fees and costs to be awarded against petitioners-attorneys, is annexed as Appendix B. The District Court's order, dated March 17, 1986, denying petitioners-attorneys' Rule 59(e) motion is annexed as Appendix D. The order of the District Court, dated April 8, 1986, denying petitioners-attorneys' request for Rule 60(b) relief is annexed as Appendix E. The order of the Court of Appeals' motion panel dismissing petitioners-attorneys' appeal, filed September 2, 1986, is annexed as Appendix H.

## JURISDICTION

The order of the Court of Appeals' motion panel summarily dismissing petitioners-attorneys' appeal from the second "final" judgment entered in this case is dated September 2, 1986 (Appendix H). In a companion case before this Court, Docket No. 86-598, petitioners-attorneys have also petitioned for certiorari with regard to the first final judgment entered in this matter and particularly with respect to the injunction entered as a sanction against petitioners-attorneys by the District Court for alleged "bad faith" litigation.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

Petitioners-attorneys represent a group of shareholders who

own stock in Teltronics Services, Inc., a bankrupt corporation. Petitioners-attorneys' clients filed a class action suit in the Eastern District of New York on September 23, 1983, alleging an anticompetitive conspiracy by respondents to seize the assets of Teltronics by forcing that company into bankruptcy by means of, among other things, the publication — during negotiations with respondent Ericsson for Teltronics' acquisition — of misleading and deceptive press releases across the Dow-Jones broad tape which duped Teltronics' shareholders into selling their shares of stock. The details of plaintiffs' claims are set forth in the companion petition for certiorari, referred to above, which deals with the first final judgment entered in the action.

## THE FACTS

On November 15, 1983, respondents moved — before joinder of issue — for summary judgment. By memorandum and order dated August 30, 1985, the District Court granted respondents' motion, *Rand v. Anaconda-Ericsson, Inc.*, 623 F. Supp. 176 (E.D.N.Y. 1985), and in doing so, also granted respondents' motion for sanctions against petitioners-attorneys (relating to the *commencement* of the action) on the ground that the latter had allegedly demonstrated "bad faith" in opposing respondents' summary judgment motion. According to the District Court, petitioners-attorneys, rather than opposing the motion on their clients' behalf, should instead have agreed to the entry of judgment against those clients, thus saving respondents "the costs and fees of preparing additional papers." An injunction was then entered by the court against petitioners-attorneys, without a hearing, permanently enjoing them (and their clients) from pursuing "any new or pending litigation" which "concerns Teltronics Services, Inc."[1]

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1. None of the plaintiffs in this action was ever a party or a privy of any party to any other litigation involving Teltronics, past or present, and the District Court conceded that *res judicata* was not an issue in the case.

Petitioners-attorneys moved for reargument, requesting a specification of the findings of alleged "bad faith" litigation leveled at them and for the opportunity to be heard at an evidentiary hearing. On December 2, 1985, the District Court denied petitioners-attorneys' motion and gave respondents 20 days to submit a fee petition. Prior to the court's determining the amount of sanctions to be awarded, however, plaintiffs filed a notice of appeal from the court's August 30, 1985 and December 2, 1985 orders. In addition, on January 31, 1986, the court entered its first final judgment dismissing the action (Appendix A). At plaintiffs' request, the record in the case was also transmitted to the Court of Appeals on February 6, 1982.[2]

Thereafter, however, on February 28, 1986, the District Court ruled on respondents' fee petition and imposed liability on petitioners-attorneys in the sum of $20,000 (Appendix B). Petitioners-attorneys then moved for reargument and for Rule 59(e) relief. During the pendency of the latter motion, the second judgment was entered in the action (Appendix C, dated March 6, 1986 and entered March 7, 1986). Petitioners-attorneys immediately (to avoid having a personal judgment against them on file in the courts) moved to vacate that judgment under Rule 60(b)(4) (void judgment) alleging that the District Court, after the filing of a notice of appeal in connection with the first final judgment, had been ousted of jurisdiction in the case.

While the Rule 60(b) motion was awaiting decision, petitioners-attorneys' Rule 59 motion was denied by the court. Once the Rule 59 motion had been disposed of, petitioners-attorneys filed a notice of appeal from the court's February 28,

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2. Petitioners-attorneys claim that the filing of their notice of appeal ousted the District Court of jurisdiction in the matter and that court's subsequent orders, other than those in aid of the appeal, were null and void, including the entry of the second judgment for monetary sanctions.

1986 order and from the March 7, 1986 (second) final judgment entered thereon (Appendix H).[3]

Petitioners-attorneys' Rule 60(b) motion was denied by the court on April 8, 1986 (Appendix E). Shortly thereafter, at a conference with Staff Counsel for the Court of Appeals on April 28, 1986, the parties stipulated in writing (Appendix F), and the Court of Appeals "so ordered," the voluntary dismissal of petitioners-attorneys' appeal from the second judgment pending the outcome of the appeal taken from the first judgment in the case.

The Court of Appeals affirmed the entry of the first final judgment on July 9, 1986, 794 F. 2d 843. Thereafter, petitioners-attorneys reinstated their appeal from the second final judgment

---

3. Forms C and D were served and filed pursuant to the Second Circuit's local rules on April 10, 1986. These forms outlined the following issues for consideration by the Court of Appeals:

> 1. Did the district court err in assessing, without a hearing, $20,000.00 in sanctions against plaintiffs' attorneys for alleged "bad faith" litigation?
>
> 2. Did the district court err in assessing sanctions against plaintiffs' attorneys without a proper evidentiary basis and based solely on the court's subjective impression concerning what a reasonable fee should have been?
>
> 3. Did the district court violate plaintiffs' attorneys' constitutional rights (and the rights of their clients) in assessing sanctions against plaintiffs' attorneys?
>
> 4. Did the district court have jurisdiction to enter a second judgment in the action against plaintiffs' attorneys after the court had already entered a final judgment in the action?
>
> 5. Was the defendants' alleged right to attorneys' fees waived by entry of final judgment in the case?

by the service, on July 28, 1986, of a "Notice of Reinstatement of Appeal" (Appendix G). The notice was sent to all parties, filed with the Court of Appeals, and transmitted to the District Court for docketing.

On August 21, 1986, respondents moved to dismiss the appeal on the ground that petitioners-attorneys' notice of appeal had not been timely filed. According to respondents, since petitioners-attorneys' Rule 60(b) motion (clearly designated as such) had been served within the ten day period for making Rule 59(e) motions, petitioners-attorneys' notice of appeal filed before disposition of the Rule 60(b) motion was void and of no effect.

A motion panel of the Court of Appeals granted respondents' motion on September 9, 1986, summarily dismissing petitioners-attorneys' appeal. There was no opinion.

## REASONS FOR GRANTING THE WRIT

### I.

**THE DISTRICT COURT LACKED AUTHORITY TO ENTER A SECOND FINAL JUDGMENT. IN ANY EVENT, PETITIONERS-ATTORNEYS' RULE 60(b) MOTION DID NOT AFFECT THE FINALITY OF THAT PURPORTED JUDGMENT AND RULE 4(a)(4), F.R.A.P., THEREFORE HAS NO APPLICATION.**

Subdivision (1) of Rule 4(a), F.R.A.P., provides that a notice of appeal in a civil case, where an appeal is taken as of right, shall be filed within 30 days after entry of the judgment or order appealed from. However, subdivision (4) of the Rule provides that where a timely motion is made under Rules 50(b), 52(b), 59(b) or 59(e), Fed. R. Civ. P., the time for appeal runs from the entry of the order granting or denying the motion.

In August 1985, the District Court granted summary judgment dismissing the complaint, awarded sanctions for alleged "bad faith" litigation against petitioners- attorneys, and enjoined them from further prosecuting the action. Final judgment was entered on January 31, 1986. After a notice of appeal had been filed, the District Court entertained respondents' petition regarding the *amount* of sanctions to be awarded. It subsequently entered a second final judgment on March 7, 1986 in the sum of $20,000 (Appendix C).

With respect to this second final judgment, petitioners-attorneys made two separate motions. One was a Rule 59(e) motion, which was denied. The second was a motion under Rule 60(b)(4) to declare the second final judgment void for lack of jurisdiction. It too was denied.

Respondents argued in the Court of Appeals that despite the fact that petitioners-attorneys had already made a motion under Rule 59(e), their Rule 60(b) motion (plainly designated as such) must also be treated as a (second) motion under Rule 59(e) since it had been made within 10 days of entry of the second final judgment. Respondents were clearly wrong.

Rule 4(a)(4) does not mention or refer to Rule 60(b) in its recital of the kind of motions affected by it. Indeed, Rule 60(b) expressly provides that a motion made under that section "does not affect the finality of a judgment or suspend its operation."[4]

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4. Rule 60(b) states:

> "The motion shall be made within a reasonable time and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b) *does not affect the finality of a judgment or suspend its operation*" (emphasis added).

In addition, Rule 4(a)(4)(iii) limits the application of Rule 59(e) to efforts to "alter or amend" the judgment. Petitioners-attorneys in making their Rule 60(b) motion were clearly not attempting to "alter or amend" the (second) judgment. On the contrary, they sought a determination that the judgment of March 7, 1986 was void and non-existent in view of the fact that the filing of their notice of appeal from the first final judgment (which judgment involved the award of sanctions but not the amount thereof) had ousted the District Court of jurisdiction. Accordingly, the court had no power to enter a second judgment on the subject of the amount of sanctions to be awarded. *See* 9 J. Moore, *Federal Practice,* § 203.11 (the filing of a notice of appeal divests the District Court of authority to proceed except for matters in aid of the appeal or to correct clerical mistakes); *see also,* 16 Wright & Miller, *Federal Practice and Procedure,* § 3949 at 358-59 (1977) ("So complete is this transfer of jurisdiction that any orders of the district court touching upon the substance of the matter on appeal are considered null and void if entered subsequent to the timely filing of the notice of appeal"); *United States v. Hitchmon,* 587 F. 2d 1357, 1359 (5th Cir. 1979) ("The appeal is pending once the notice of appeal is filed—and during its pendency the district court has only a very limited power to act with respect to the matters appealed").[5]

Moreover, there is no 10-day limitation on the making of a Rule 60(b) motion as there is in the case of the other motions which come under the aegis of Rule 4(a)(4). Indeed, Rule 60(b) itself makes no mention of the period within which a motion to declare a judgment void must be made after a notice of appeal has been filed. Instead, it sets up an outside limit of one year

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5. A federal appellate court is also required to examine the basis of its jurisdiction, *sua sponte* if necessary. *United States v. Mendoza,* 491 F. 2d 534, 536 (5th Cir. 1974).

prescribing a "reasonable time" standard which invites a flexible application in varying circumstances.[6] *Lairsey v. Advance Abrasives Co.*, 542 F. 2d 928, 930 (5th Cir. 1976).

Great confusion exists among the various Circuit Courts regarding the treatment of post-judgment motions involving Rules 59(e) and 60(b). For example, motions for reconsideration have been characterized as either motions under Rule 59(e), F. R. Civ. P., *see e.g., A.D. Heiss Lithograph v. Illinois Adhesive Products Co.*, 705 F. 2d 248, 249-50 (7th Cir. 1983) (*per curiam*), or as motions under Rule 60(b). Some courts consider the substance of a motion in determining whether a post-judgment motion is one to alter or amend a judgment under Rule 59(e) or a motion for release from judgment under Rule 60(b). *United States v. 1982 Sanger 24' Spectra Boat*, 738 F. 2d 1043 (9th Cir. 1984); *Smith v. U.S. Parole Commission*, 721 F. 2d 346, 348 (11th Cir. 1983); *Bank of California, N.A. v. Arthur Andersen Co.*, 709 F. 2d 1174, 1176 (7th Cir. 1983). Other courts consider *any* motion made within ten days of the entry of judgment to be a motion to alter or amend that judgment. *Venable v. Haislip*, 721 F. 2d 297, 299 (10th Cir. 1983); *Vreeken v. Davis*, 718 F. 2d 343, 345 (10th Cir. 1983).

This lack of coherence is a trap for the unwary as the instant case demonstrates. Although on at least two occasions the Second Circuit has dealt with the issue of whether a motion to amend a judgment should be considered as a motion made under Rule 59(e) or under Rule 60, no definitive rule has been developed.

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6. *See* footnote 4, *supra*. Rule 59(b) and 59(e) require a motion for a new trial and a motion to alter or amend a judgment to be "served not later than 10 days after entry of the judgment." Rule 50(b) requires a motion for judgment n.o.v. to be "moved for" not later than 10 days after entry of judgment. Rule 52(b) provides that a motion to amend or make additional findings of fact must be "made" not later than 10 days after entry of judgment.

Such guidance that exists points to the conclusion that the Second Circuit will look to the substance of the motion to determine how a particular motion should be treated. *Lyell Theatre Corp. v. Loews Corp.*, 682 F. 2d 37, 41 (2d Cir. 1982); *Daily Mirror, Inc. v. New York News, Inc.*, 533 F. 2d 53 (2d Cir. 1976). On the other hand, in dismissing petitioners-attorneys' appeal in the present case, the Court of Appeals — without an opinion — appears to have adopted, *sub silentio*, the rule set forth by the Fifth Circuit in *Harcon Barge II*, 784 F. 2d 665 (5th Cir. 1986), a rule which was finally settled only after a rehearing *en banc* was held to resolve a conflict between *Harcon Barge I*, 746 F. 2d 278 (5th Cir. 1984)[7] and *Willie v. Continental Oil Co.*, 746 F. 2d 1041 (5th Cir. 1984). *Harcon Barge II* held that *any* post-judgment motion to alter or amend a judgment served within ten days after entry of judgment, other than a motion to correct purely clerical errors covered by Rule 60(a) — but including a motion made under Rule 60(b) — falls within the scope of Rule 59(e) and must, however designated by the movant, be considered a Rule 59 motion for purposes of Rule 4(a)(4), F.R.A.P.

Such a conclusion is, it seems, flatly contrary to the position taken by numerous other Circuits, including as noted, that of the Second Circuit prior to the instant dismissal. It also appears to be contrary to the expressly recognized power in the District Courts to consider on the merits and to grant or deny[8] a Rule

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7. *Harcon Barge I* was itself an attempt to resolve two conflicting determinations by separate Fifth Circuit motion panels.

8. While originally the District Courts were required to obtain leave of a court of appeals before *granting* (as opposed to denying) a Rule 60(b) motion, 11 Wright & Miller, *Federal Practice and Procedure*, § 2873 at p. 263, this Court has now ruled that such leave is no longer necessary. *Standard Oil Co. of California v. United States*, 429 U.S. 17 (1976) ("The appellate-leave requirement adds to the delay and expense in litigation and also burdens the increasingly scarce time of the federal appellate courts").

60(b) motion filed after a notice of appeal has been timely filed. 11 Wright & Miller, *Federal Practice and Procedure*, § 2873 at pp. 265-266; *Ryan v. U.S. Lines Co.*, 303 F. 2d 430, 434 (2d Cir. 1962); *Lairsey v. Advance Abrasives Co.*, 542 F. 2d 928, 930 (5th Cir. 1976).

This procedural conflict — important to the rights of petitioners-attorneys and to the rights of litigants in the federal system generally — urgently calls for this Court's attention and resolution.

## II.

## THE NOTICE OF APPEAL FROM THE SECOND FINAL JUDGMENT WAS TIMELY FILED.

Petitioner-attorneys' Rule 60(b) motion was denied on April 8, 1986 and an order to that effect was entered on April 16, 1986. Assuming that respondents' argument is correct and that the motion was equivalent to a Rule 59 motion, petitioners-attorneys had 30 days from April 16 within which to file a notice of appeal. On April 28, 1986, at a conference with staff counsel for the Second Circuit, well within this 30-day period, the parties to the lawsuit stipulated to, and the Court of Appeals "so ordered", the voluntary dismissal of petitioners-attorneys' appeal subject to its reinstatement within 20 days from the date of determination of the then pending appeal from the first judgment entered in the action.[9] Petitioners-attorneys' appeal from the second final judgment was thereafter reinstated by their "Notice of Reinstatement of Appeal" dated July 28, 1986, which was sent to all parties, filed with the Second Circuit, and transmitted to the District Court for docketing. A statement of the issues raised

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9. Such other appeal, as noted, is still pending in this Court at this moment, with a petition for a writ of certiorari, Docket No. 86-598, October 1986 Term.

on appeal was also set forth in Forms C and D under the Second Circuit's appellate rules, served and filed with the Court of Appeals on April 10, 1986.

Accordingly, under the circumstances of this case even if petitioners-attorneys' Rule 60(b) motion were properly to be treated as a (second) Rule 59 motion, petitioners-attorneys have still filed a timely notice of appeal within the meaning of Rule 3(c), F.R.A.P., which provides that an appeal "shall not be dismissed for informality of form or title of the notice of appeal." The Advisory Committee Notes to that rule explain the significance of the quoted language as follows:

> "[I]t is important that the right to appeal not be lost by mistakes of mere form. In a number of decided cases it has been held that so long as the function of notice is met by the filing of a paper indicating an intention to appeal, the substance of the rule has been complied with. *See e.g., Cobb v. Lewes,* (C.A. 5th, 1974) 488 F.2d 41; *Holley v. Capps,* (C.A. 5th, 1974) 468 F.2d 1366. The proposed amendment would give recognition to this practice."

The courts have therefore recognized a host of substantial equivalents to the formal act of filing a proper written notice of appeal with the court. The thrust of these decisions is that, given a failure to abide by that simple requirement, an effective substitute only requires some sort of entry on the written record that might reasonably be construed as a notice of appeal and which in fact gives notice to the courts and the other parties of the intention to appeal from a particular judgment. 16 Wright & Miller, *Federal Practice and Procedure,* § 3949 at pp. 356-358 (1977).

> "[I]t is clear beyond cavil that Appellate Rules 3

> and 4 tolerate a common sense approach to timely filing, and do not insist upon 'literal compliance in cases in which it cannot fairly be exacted. . .' We think a filing requirement is met by a positive, substantial and unequivocal effort to discharge it. . . We agree with the Fifth Circuit that 'it would . . . be a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty on justice, to hold that the extremely simple procedure required by the (Rules) is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with (them) defeats substantial rights.' " *Alley v. Dodge Hotel,* 501 F. 2d 880, 884 (D.C. Cir. 1974).

Or as this Court phrased it in *Foman v. Davis,* 371 U.S. 178, 181 (1962):

> "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits'. . ."

The notice of appeal was, under the circumstances of this case, timely filed.

## CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

CARL E. PERSON
*Counsel of Record*
WALTER C. REID
*Attorneys for Petitioners*

## APPENDIX A—FIRST FINAL JUDGMENT DATED JANUARY 30, 1986 FILED JANUARY 31, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 83 4268 (ERN)

MICHAEL M. RAND

Plaintiffs,

-against-

ANACONDA-ERICSSON, INC.

Defendants.

JUDGMENT

A order of Honorable Edward R. Neaher, United States District Judge, having been filed on August 30, 1985, dismissing the plaintiff's complaint, it is

ORDERED and ADJUDGED that the plaintiff's complaint is dismissed.

s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

Dated: Brooklyn, New York
January 30, 1986

## APPENDIX B—DISTRICT COURT'S MEMORANDUM AND ORDER DATED FEBRUARY 28, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO, and VINCENT F. SERVELLO,

Plaintiffs,

-against-

ANACONDA-ERICSSON, INC., ERICSSON, INC., L.M. ERICSSON TELEPHONE CO., NORDIC AMERICAN BANK, CITIBANK, N.A., PRICE-WATERHOUSE & CO., SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP., and STEPHEN R. COHEN,

Defendants.

APPEARANCES:

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New York, New York
Attorneys for Plaintiffs

SULLIVAN & CROMWELL
New York, New York
Attorneys for Defendants Anaconda-Ericsson, Inc., Ericsson, Inc., L.M. Ericsson Telephone Co., Sullivan & Cromwell, Richard R. Howe, Richard G. Lyon, and L. Stanton Towne
By: ROBINSON B. LACY, ESQ.

*Appendix B*

WHITE & CASE
New York, New York
Attorneys for Nordic American Bank
By: ALLAN L. GROPPER, ESQ.

MEMORANDUM AND ORDER

NEAHER, District Judge.

This case is before the Court upon the fee petitions of defendants Anaconda-Ericsson and Nordic American Bank, pursuant to the Court's award of attorneys fees as a sanction against plaintiffs' attorneys. *Rand v. Anaconda-Ericsson, Inc.*, 623 F. Supp. 176, 191 (E.D.N.Y. 1985). Although the Court imposed this sanction as part of its inherent equitable power to deal with plaintiffs' attorneys bad faith conduct, *Tedeschi v. Smith Barney*, etc., 579 F. Supp. 657, 661 (S.D.N.Y. 1984), *aff'd* 757 F. 2d 465 (2d Cir. 1985) (per curiam), the parties cite Fed. R. Civ. P. 11, which provides in relevant part (effective August 1, 1983),

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper, that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . If a pleading, motion, or other paper is signed in violation of this rule, the

> court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee."

On behalf of the firm of Sullivan & Cromwell, attorney Robinson Lacy has submitted papers in support of a request of $48,000 for 254.5 hours of time (Richard Howe, 2.25 hours; Robert Osgood, 3.5 hours; Robinson Lacy, 110.75 hours; Maria Foscarinas, 113.75 hours; and law clerk and paralegals, 24.25 hours) and $7,842.30 in disbursements, all of which Ericsson has agreed to pay. Likewise, on behalf of the firm of White & Case, which represents defendant Nordic American Bank, attorney Allan L. Gropper has submitted papers in support of a request of $3,506 for 20.5 hours of time (Allan L. Gropper, 5.3 hours; Robert J. Morrow, 15.2 hours) and $95.30 in disbursements. Lacy also asks the Court to determine the conditions of a stay pending plaintiffs' attorneys' appeal of the award of fees, requesting that they post a supersedeas bond for 111% of the amount of the award pursuant to Fed. R. Civ. P. 62 and local civil rule 42.

In response, plaintiffs' attorneys object to the adequacy of the documentation and the legitimacy of imposing various charges and expenditures upon them. They also contend that defendants have not identified hours specifically devoted to their acts of bad faith conduct and have not identified hours so as to permit the Court to establish different rates for different taks. Further, they charge that much of Ericsson's attorneys' hours are duplicative, that Nordic's attorneys' hours are entirely duplicative of Ericsson's

attorneys' hours, and that Sullivan & Cromwell has failed to identify hours spent defending itself as opposed to defending Ericsson. They ask for a hearing and discovery related to these objections.

In response to the Court's order of December 2, 1985 and prior to the filing of the fee petition, plaintiffs' attorneys filed a notice of appeal, which set in motion the processing of the appeal even though no judgment dismissing the complaint has been entered. The Clerk of the Court eventually entered a judgment. In the interim the parties had filed the instant papers relevant to the amount of the sanction. Apparently not pleased with the potential of confronting two appeals, one concerning the dismissal of the complaint and the award of sanctions and the other concerning the amount of the sanction, Lacy moved the Court of Appeals to adjourn the briefing and argument schedule for the appeal, which motion was

> "denied without prejudice to renewal upon a showing that the District Court has, within a reasonably prompt time, determined the amount of attorneys' fees to be assessed against plaintiff and its counsel."

For clarification of the record, this Court has awarded a sanction only against plaintiffs' attorneys. 623 F. Supp. at 185.

In its discretion, the Court could await the outcome of the appeal and then determine the amount of the sanction, a prudent course in light of the possibility, always present in appellate review, that the Court of Appeals may reverse the dismissal of the complaint, thereby rendering the issue of the amount of the sanction moot. However, to take advantage of the potential for

final resolution of this case through consolidation of appeals, and upon consideration of the papers submitted, the Court finds no reason to delay further its ruling on the amount of the sanction.

Moreover, a response to each of plaintiffs' attorneys many objections addressed to the fee petition would entail considerable expenditure of judicial resources and would result in a second major and unjustified litigation, *see Hensley v. Eckerhart,* 103 S. Ct. 1933, 1941 (1983), and more importantly, would shift the focus of this matter away from the law relevant to the imposition of sanctions. Simply put, in determining the amount of a sanction, including the award of attorney's fees for bad faith conduct, the Court is not bound by the contents of the fee petition.

> "[R]ule 11 only authorizes 'reasonable' fees, not necessarily actual fees. Thus, '[t]he assessment of fees against a nonprevailing litigant must be fair and reasonable based upon the particular circumstances of the case.' *Tedeschi v. Smith Barney, Harris Upham & Co., Inc.,* 579 F. Supp. 657, 664 (S.D.N.Y. 1984) (case arose while old rule 11 was still in effect). The court in *Tedeschi* found that sanctions were proper, but only allowed the defendant to recover $10,000 of the $49,235.75 attorneys's fee bill."

*United Food & Commercial Workers v. Armour and Co.,* 106 F.R.D. 345, 349 (N.D. Cal. 1985).

> "Any award is limited by the rule to 'the reasonable expenses incurred * * * including a reasonable attorney's fee.' Thus the measure is not actual expenses and fees but those the court

> determines to be reasonable. Proof of the expenses and fees actually incurred will be helpful to the court's determination, but the award will be based on what is found to be reasonable. A party having vigorously resisted a baseless claim may therefore find that the court, in making an award, will consider its expenditures to have been excessive.
>
> "While the determination of attorney's fees should be guided by reference to factors commonly used by federal courts for that purpose, and be supported by findings, the court should observe the Advisory Committee's caution to avoid satellite litigation, particularly additional discovery, and attempt to make its decision on the basis of the record, augmented by appropriate declarations."

Schwarzer, *Sanctions Under the New Federal Rule 11*, 104 F.R.D. 181, 203 (1985) (footnotes to case citations omitted) (the author is a judge in the Northern District of California).

Cognizant of the appropriate standard, then District Judge and now Circuit Judge Miner considered an application for sanctions by Sullivan & Cromwell against a *pro se* plaintiff in *Taylor v. Prudential-Bache Securities, Inc.*, 594 F. Supp. 226 (N.D.N.Y. 1984), *aff'd* 751 F. 2d 371 (2d Cir. 1984). In granting the application, he reduced the requested amounts for fees by 1/2 and 2/3, noting of one of the cases involved,

> "This action was not only of the shortest duration, involving less than one hundred hours, but Sullivan & Cromwell was performing services on behalf of itself as a defendant and so would not normally

be remunerated at the rate it bills its clients."

*Id.* at 229. Most significantly, he also stated,

> "While it appears that counsel's bottom-line request has taken into account the facts the Court is itself concerned with, and while the Court views the request as both a realistic and reasonable one, it will nonetheless reduce the award substantially."

*Id.* at 228-29 (citation omitted). Logically, therefore, objections addressed to a fee petition, in the context of an award of fees as a sanction, offer little guidance for the appropriate amount of the sanction in light of the circumstances and the record of the case. A disposition of the merits of each of plaintiffs' attorneys' objections to the fee petition would not necessarily move the record closer to establishing the reasonable amount of effort responsive to their bad faith conduct. Consequently, the Court may determine the amount of the sanction in a particular case with regard to its familiarity with the case and its knowledge of what would be a reasonable expenditure of effort to respond appropriately to an attorney's bad faith conduct in that case.

Additionally, an award of an amount less than that actually expended would not cast doubt upon the veracity of the amount requested in the fee petition. For example, in this case, Lacy could not have been certain that the Court would view plaintiffs' attorneys' conduct in responding to defendants' motion for summary judgment as evidencing bad faith. As a result, and in keeping with his professional obligations, he would respond to their opposing papers even if he felt that such papers were unnecessary. The Court has raised this illustration primarily to respond to plaintiffs' attorneys' argument that, in essence,

defendants' reply papers, the preparation of which accounts for a sizeable share of the requested hours, add little to the original moving papers. In preparing those papers, consulting with co-counsel, and engaging in other activities in defense of this litigation after March 22, 1985, defendants' attorneys did not have the benefit of the Court's views concerning the lack of merit and frivolity of plaintiffs' attorneys' conduct until August 30, 1985.

Plaintiffs' attorneys' remaining arguments are either makeshift or not appropriately raised at this late date. The Court has already explained that the determination to award a sanction was made in a manner consistent with the notice and opportunity to be heard required by the due process clause of the Fifth Amendment. Without citation to authority, they demand a "jury trial on the issue of the assessment of damages under the 7th Amendment to the U.S. Constitution." In awarding sanctions, the Court is the trier of fact, which in this case has been determined on the papers of record. Finally, their contention concerning the right to counsel under 28 U.S.C. § 1654 is meritless. The Court has done absolutely nothing to prevent plaintiffs' attorneys from retaining independent counsel.

In response to defendants' contentions concerning a stay and the posting of a bond, plaintiffs' attorneys contend that the issue is premature. Although plaintiff's attorneys have not affirmatively stated that they are not requesting or have not requested a stay of the Court's award of a sanction, the record discloses that no such application has been made. Under Fed. R. Civ. P. 62(d), which provides,

> "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this

> rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.",

the court obviously cannot approve a bond which has not yet been submitted. Moreover, the notice of appeal may not be filed until the entry of this order. The Court regards defendants' arguments as addressing matters anticipated in the future in a manner designed to avoid the submission of additional papers.

In the interests of justice, and after considering all the relevant factors and circumstances with regard to the punitive nature of a sanction, as tempered by the aim of not chilling legitimate efforts to prosecute claims, the Court imposes liability upon plaintiffs' attorneys, jointly and severally, for $1,500 to defendant Nordic American Bank and $18,500 to defendant Anaconda-Ericsson, Inc.

Copies of this memorandum and order are being forwarded to counsel for the parties.

SO ORDERED.

s/ Edward R. Neaher
U. S. D. J.

Dated: Brooklyn, New York
February 28, 1986

## APPENDIX C—SECOND FINAL JUDGMENT DATED MARCH 6, 1986, ENTERED MARCH 7, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 83 4268 (ERN)

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO, and VINCENT F. SERVELLO,

Plaintiffs,

-against-

ANACONDA-ERICSSON, INC., ERICSSON, INC., L.M. ERICSSON TELEPHONE CO., NORDIC AMERICAN BANK, CITIBANK, N.A., PRICE-WATERHOUSE & CO., SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP., and STEPHEN R. COHEN,

Defendants.

JUDGMENT

A judgment having been entered on January 30, 1986 dismissing the complaint prior to a decision on the defendants' Anaconda-Ericsson and Nordic American's fee petitions and a memorandum and order of Honorable Edward R. Neaher, United States District Judge, having been filed on February 28, 1986, imposing liability upon plaintiffs' attorneys, jointly and severally, for $1,500 to defendant Nordic American Bank and $18,500 to defendant Anaconda-Ericsson, Inc., it is

*Appendix C*

ORDERED and ADJUDGED that liability is imposed upon the plaintiffs' attorneys, jointly and severally, for $1,500 to the defendant, Nordic American Bank and for $18,500 to the defendant, Anaconda-Ericsson, Inc.

ROBERT C. HEINEMANN
Clerk of Court

Dated: Brooklyn, New York
March 6, 1986

## APPENDIX D—DISTRICT COURT'S ENDORSED ORDER DATED MARCH 17, 1986, ENTERED MARCH 25, 1986

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

83 Civ. 4268 (ERN)

MICHAEL M. RAND, et al.,

Plaintiffs,

-against-

ANACONDA-ERICSSON, INC., et al.,

Defendants.

TO: Attorneys for Defendants

PLEASE TAKE NOTICE that, upon the pleadings, all prior papers and proceedings heretofore had herein, the undersigned will move this Court in Chambers (Room 252), before the Honorable Edward R. Neaher, United States District Judge, at the United States Courthouse for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on March 24, 1986, or at such other date as may be set by the Court,

Under Rule 3(j), Civil Rules for the Eastern District of New York, for reargument (or an order directing reargument) of the Court's decision in its Memorandum and Order dated February 28, 1986 (the "Court's Decision") limited to the Court's holding (on page 10) that "the Court has done absolutely nothing to prevent plaintiffs

*Appendix D*

The within motion is denied.

s/ Edward R. Neaher
U.S.D.J.

Dated: March 17, 1986.

**APPENDIX E—ENDORSED ORDER OF THE DISTRICT COURT DATED APRIL 8, 1986 DENYING PETITIONERS-ATTORNEYS' REQUEST FOR RULE 60(b) RELIEF**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

83 Civ. 4268 (ERN)

MICHAEL M. RAND, et al.,

Plaintiffs,

-against-

ANACONDA-ERICSSON, INC., et al.,

Defendants.

NOTICE OF MOTION

TO: Attorneys for Defendants

PLEASE TAKE NOTICE that, upon the annexed affidavit of William C. Reid, sworn to March 17, 1986, and the pleadings all prior papers and proceedings heretofore had herein, the undersigned will move this Court in Chambers (Room 252), before the Honorable Edward R. Neaher, United States District Judge, at the United States Courthouse for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York, on Friday, March 28, 1986, or at such other date as may be set by the Court,

(i) For an order under Rules 60(b)(4) (void judgment) vacating the judgment entered in this action on March 7, 1986 against plaintiffs' attorneys;

*Appendix E*

(ii) In the alternative, and without waiving the argument that the judgment against plaintiffs' attorneys is void, for an order under Rule 62(d), F.R.Civ.P. or other applicable rule,

(a) fixing the amount of supersedeas bond to be posted and

(b) for a stay of execution of such judgment pending determination of plaintiffs' motion for reargument and pending any noticed appeal thereafter; and

Motion denied except to the extent of permitting plaintiffs to post a supersedeas bond in the sum of $20,000.00, pending determination of plaintiffs' appeal.

s/ Edward R. Neaher, U.S.D.J.

Dated: April 8, 1986

## APPENDIX F—STIPULATION OF VOLUNTARY DISMISSAL OF PETITIONERS-ATTORNEYS' APPEAL, DATED APRIL 28, 1986, "SO ORDERED" BY THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDNY 83 cv 4268

NEAHER

Docket No. 86-7236

RAND

v

ANACONDA-ERICSSON

The undersigned hereby stipulate that the above entitled appeal is hereby withdrawn without costs and without attorneys' fees and without prejudice subject to reinstatement by written notice to the Clerk by 20 days after 2nd Cir. decides earlier appeal in this matter, 86-7034, and if not thus reinstated shall be deemed withdrawn with prejudice.

s/ Carl E. Person
CARL E. PERSON
Attorney for Appellants

*Appendix F*

SULLIVAN & CROMWELL
s/ Robinson B. Lacy
Attorney for Appellees
Anaconda-Ericsson Inc., Ericsson Inc., L.M. Ericsson Telephone Co., Sullivan & Cromwell, Richard Howe, Richard G. Lyon and L. Stanton Towne

WHITE & CASE
s/ Robert Morrow by R.B. Lacy
ROBERT MORROW
Attorneys to Nordic American Banking Corp.

SO ORDERED:
FOR THE COURT,

Dated: April 28, 1986

s/ Elaine B. Goldsmith
Elaine B. Goldsmith,
Clerk

*Appendix F*

7-20-05

D. Cosy ✓

Counsel: R. Osgood

R. Lyon

A. Hoopes

P. Hamlet

W Pennell

P. Sic Donaghi

C. Pusey

W. Reed

Camp ✓

Cal ✓

Jim ✓

Ben ✓

13

+ 2 TBD

15

**APPENDIX G—NOTICE OF REINSTATEMENT OF APPEAL FILED JULY 28, 1986**

LAW OFFICES
CARL E. PERSON
132 NASSAU STREET
NEW YORK, N.Y. 10038
(212) 349-4616

July 28, 1986

Elaine B. Goldsmith, Clerk
Court of Appeals for the Second Circuit
United States Courthouse
Foley Square
New York NY 10007

Re: Rand v. Anaconda-Ericsson
Docket No. 86-7236

Dear Ms. Goldsmith:

Pursuant to the stipulation filed April 28, 1986, we hereby file a Notice of Reinstatement of Appeal.

Very truly yours,

s/ Carl E. Person
Carl E. Person

*Appendix G*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 86-7236

RAND V ANACONDA-ERICSSON, INC.

NOTICE OF REINSTATEMENT OF APPEAL

TO:

Elaine B. Goldsmith, Clerk
Court of Appeals for the Second Circuit
United States Courthouse
Foley Square
New York NY 10007

PLEASE TAKE NOTICE that pursuant to the stipulation filed April 28, 1986 (a copy of which is annexed hereto), we hereby give notice of the reinstatement of the above-captioned appeal. This notice is being filed within the 20 day period after the Second Circuit's decision in 86-7034 was filed. A motion for rehearing and request for rehearing in banc in 86-7034 were made but have not yet been decided.

Dated: July 28, 1986
New York, New York

s/ Carl E. Person
Carl E. Person, Appellant

s/ Walter C. Reid
Walter C. Reid, Appellant

**APPENDIX H—ORDER OF THE COURT OF APPEALS' DISMISSING PETITIONERS-ATTORNEYS' APPEAL FILED SEPTEMBER 2, 1986**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

86-7236

RAND

V.

ANACONDA-ERICSSON

NOTICE OF MOTION TO DISMISS THE APPEAL

ORDER

Before: Hon. Walter R. Mansfield, Hon. Lawrence W. Pierce and Hon. George C. Pratt, CJJ.

IT IS HEREBY ORDERED that the motion be and it is hereby GRANTED.

Elaine B. Goldsmith,
Clerk

s/ Edward J. Guardaro
By: Edward J. Guardaro,
Deputy Clerk.

September 2, 1986

(2)

No. 86-922

Supreme Court, U.S.
FILED
FEB 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO, and VINCENT F. SERVELLO,

*Petitioners,*

—*v.*—

ANACONDA-ERICSSON INC., ERICSSON, INC., L M ERICSSON TELEPHONE COMPANY, NORDIC AMERICAN BANKING CORPORATION, CITIBANK, N.A., PRICE WATERHOUSE, SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP., and STEPHEN R. COHEN,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

ROBINSON BURRELL LACY
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*Counsel of Record for Respondents Anaconda-Ericsson Inc., Ericsson, Inc., L M Ericsson Telephone Company, Sullivan & Cromwell, Richard Howe, Richard G. Lyon, and L. Stanton Towne*

Robert M. Osgood
Christopher Allegaert
SULLIVAN & CROMWELL
*Of Counsel*

[Counsel for Respondents Continued on Inside of Front Cover]

20P

RICHARD GRANT LYON
Ericsson, Inc.
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Richardson, Texas 75081
(214) 997-0743

*Pro Se and as Attorney for Respondents Anaconda-Ericsson Inc., Ericsson, Inc., and L M Ericsson Telephone Company*

WHITE & CASE
1155 Avenue of the Americas
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(212) 819-8200

*Attorneys for Respondent Nordic American Banking Corporation*

Allan L. Gropper
Robert J. Morrow
*Of Counsel*

February 6, 1987

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

**No. 86-922**

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO, and VINCENT F. SERVELLO,

*Petitioners*,

—*v.*—

ANACONDA-ERICSSON INC., ERICSSON, INC., L M ERICSSON TELEPHONE COMPANY, NORDIC AMERICAN BANKING CORPORATION, CITIBANK, N.A., PRICE WATERHOUSE, SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP., and STEPHEN R. COHEN,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION

The Court of Appeals' order was consistent with the decisions of the other Courts of Appeals that have addressed similar issues and was a completely appropriate termination of petitioners' repeated abuse of the procedures of that court and the District Court.

## STATEMENT

The facts giving rise to the Court of Appeals' decision reflect the ceaseless efforts of plaintiffs' attorneys[1] to multiply judicial proceedings unnecessarily and abusively. This propensity has already resulted in two final decrees enjoining them from prosecuting any further litigation relating to the subject matter of this action. *See Rand* v. *Anaconda-Ericsson Inc.*, 623 F. Supp. 176 (E.D.N.Y. 1985), *aff'd*, 794 F.2d 843 (2d Cir.), *cert. denied*, 107 S. Ct. 579 (1986); *Teltronics Services, Inc. and Edward M. Beagan* v. *Anaconda-Ericsson Inc.*, 587 F. Supp. 724 (E.D.N.Y. 1984), *aff'd*, 762 F.2d 185 (2d Cir. 1985).

The protracted litigation relating to Teltronics Services, Inc., of which this petition is the last gasp, was described in the brief in opposition to the previous petition for certiorari filed by plaintiffs' attorneys in this case, no. 86-598, and is repeated here for the convenience of the Court. The claims asserted in this action are based on the same alleged course of conduct as claims that were dismissed on the merits in four earlier actions prior to the dismissal of this case. *See Teltronics Services, Inc. and Edward M. Beagan* v. *Anaconda-Ericsson Inc.*, 587 F. Supp. 724 (E.D.N.Y. 1984), *aff'd*, 762 F.2d 185 (2d Cir. 1985); *Anaconda-Ericsson Inc.* v. *Hessen (In re Teltronics Services, Inc.)*, 29 Bankr. 139 (Bankr. E.D.N.Y. 1983); *Teltronics Services, Inc.* v. *L M Ericsson Telecommunications, Inc.*, 491 F. Supp. 538 (S.D.N.Y. 1980), *aff'd*, 642 F.2d 31 (2d Cir.), *cert. denied*, 452 U.S. 960 (1981); *Teltronics Services, Inc.* v. *L M Ericsson Telephone Co.*, No. 79 Civ. 1233, slip op. (S.D.N.Y. May 9, 1979).

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1 The caption of the petition misstates the parties to this proceeding. The order of which review is sought dismissed an appeal from a judgment entered solely against plaintiffs' attorneys, Carl E. Person and Walter C. Reid, and solely in favor of defendants Ericsson, Inc., and Nordic American Banking Corporation (Pet. 11a-12a). None of the plaintiffs who are listed as petitioners or the other defendants who are listed as respondents have any interest in the petition. The real parties in interest on whose behalf the petition was filed are, and are referred to herein as, plaintiffs' attorneys.

Before the commencement of this action, but after the dismissal of the claims based on the same alleged course of conduct in three of the prior cases, plaintiffs' attorneys brought an action asserting substantially identical claims on behalf of both Teltronics and Edward M. Beagan, its largest stockholder. The District Court, unanimously affirmed by the Court of Appeals, dismissed the complaint and entered an injunction against Beagan and plaintiffs' attorneys prohibiting further prosecution of claims belonging to Teltronics. *See Teltronics Services, Inc. and Edward M. Beagan* v. *Anaconda-Ericsson Inc.*, 587 F. Supp. 724 (E.D.N.Y. 1984), *aff'd*, 762 F.2d 185 (2d Cir. 1985). In this case, plaintiffs' attorneys attempted to prosecute substantially identical claims on behalf of other Teltronics shareholders. As the District Court noted in denying their motion to reargue, "[p]laintiffs' attorneys have offered no reason why other shareholders (plaintiffs herein) should be treated differently with respect to the same claims." 623 F. Supp. at 190.

On August 30, 1985, the District Court granted defendants' motion for summary judgment (1) dismissing the complaint and (2) enjoining plaintiffs and their attorneys from prosecuting any further litigation relating to Teltronics. The District Court also granted defendants' request for an award of sanctions against plaintiffs' attorneys pursuant to Rule 11 of the Federal Rules of Civil Procedure, in an amount to be determined. 623 F. Supp. 176.

While applications to determine the amount of the sanctions were being considered by the District Court, plaintiffs and their attorneys appealed from the dismissal and injunction. Defendants moved to adjourn the appeal until the determination of the amount of the Rule 11 sanctions so that any appeal from that judgment could be consolidated with the pending appeal, but plaintiffs successfully opposed the motion on the ground that they might not appeal from the judgment for sanctions. *See* 794 F.2d at 850.

The Court of Appeals affirmed the injunction and the dismissal of the complaint, holding that the record "clearly

justifies" the injunction against further litigation, 794 F.2d at 849. The court observed that "[p]laintiffs and their attorneys seem to believe that if at first you don't prevail, sue, sue again." *Id.* Plaintiffs' attorneys also attempted to challenge the award of sanctions, but the Court of Appeals noted that the propriety of the award was not before it due to plaintiffs' successful opposition to defendants' motion for an adjournment to permit consolidation. *Id.* at 850. This Court denied certiorari. 107 S. Ct. 579 (1986).

These proceedings conclusively determined that the prosecution of this action by plaintiffs' attorneys was abusive and improper, and the only remaining issue was the amount of the sanctions to be imposed. In a Memorandum and Order dated February 28, 1986, the District Court determined the appropriate amount of the sanctions under Rule 11 to be $20,000, about one third of the amount requested (Pet. 2a). A judgment was entered against plaintiffs' attorneys in accordance with the decision on March 7, 1986 (Pet. 11a) (the "Rule 11 judgment").

Before the Rule 11 judgment was entered, plaintiffs' attorneys had made a motion for reargument concerning the order on which that judgment was based (Pet. 4). On March 17, while that motion was still pending, they nonetheless made a second motion to vacate the Rule 11 judgment on the ground that the District Court lacked jurisdiction to enter it, ostensibly pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure.[2] Plaintiffs' attorneys' argument that this motion did not affect the finality of the Rule 11 judgment or suspend its operation (Pet. 7) is flatly belied by their acknowledgement that they made the motion "to avoid having a personal judgment against them on file in the courts" (Pet. 4). The first motion was denied on March 25 (Pet. 13a-14a).

On March 31, while the second motion was still pending, and long before petitioners could possibly have been concerned that their time to appeal might elapse following the denial of

2 The motion was frivolous for the reason set forth below at 6 n.3.

the first motion, *see* Fed. R. App. P. 4(a)(1), -(4), petitioners attempted to institute simultaneous proceedings in both the District Court and the Court of Appeals by filing a notice of appeal. The District Court denied the second motion to vacate the Rule 11 judgment by an order dated April 8 and entered on April 16, 1986 (Pet. 15a-16a). Plaintiffs' attorneys therefore could have waited until after that decision to appeal without any possible concern that their time to appeal would expire.

Plaintiffs' attorneys never filed a new notice of appeal subsequent to the District Court's denial of the motion to vacate the Rule 11 judgment. Pursuant to a stipulation and order entered in the Court of Appeals on April 28, 1986, the "appeal" was withdrawn subject to reinstatement within 20 days after the determination of the appeal from the injunction and dismissal of the complaint (Pet. 17a). That appeal was decided on July 9, and plaintiffs' attorneys filed a notice purporting to reinstate their appeal on July 18, 1986 (Pet. 20a). On August 21, defendant Ericsson, Inc., made a motion to dismiss the purported appeal for lack of jurisdiction (Pet. 6). After full briefing and oral argument by plaintiffs' attorneys, the Court of Appeals granted the motion without opinion on September 2, 1986 (Pet. 22a).

In this Court plaintiffs' attorneys have continued their program of needlessly multiplying proceedings. They served their first petition for certiorari, seeking review of the decision affirming the dismissal and injunction, on October 7, 1986. This was more than a month after the second appeal was dismissed, but the petition did not mention or seek review of that order. Instead, plaintiffs' attorneys waited until the end of the 90-day period following the dismissal to file the present petition for certiorari to review that order. This unnecessary imposition on the Court and respondents is a sufficient reason in itself to deny the second petition.

## SUMMARY OF ARGUMENT

The Court of Appeals' decision involved only one question: Whether, under the particular circumstances of this case, plaintiffs' attorneys filed a valid notice of appeal. The decision that they did not is in accord with the decisions of this Court and the other Courts of Appeals that have addressed similar questions and does not raise any issue meriting review by this Court. In dismissing the appeal for lack of jurisdiction, the Court of Appeals had no occasion to and did not make any decision concerning the second question set forth in the petition, concerning the District Court's jurisdiction to enter a judgment for sanctions during the pendency of an appeal on the merits.[3]

## ARGUMENT

### I.

### THE COURT OF APPEALS' APPLICATION OF RULE 4(A)(4) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that when certain motions are timely served pursuant to Rules 50(b), 52(b) or 59 of the Federal Rules of Civil Procedure:

> "A notice of appeal filed before the disposition of [the motion] *shall have no effect*. A new notice of appeal must

---

3 There is in any event no question whatsoever that the District Court had jurisdiction to enter the judgment because it was collateral to the merits and therefore not within the scope of the rule that an appeal divests the District Court of jurisdiction of its subject matter. *See White* v. *New Hampshire Department of Employment Security*, 455 U.S. 445, 454 (1982); *Masalosalo* v. *Stonewall Insurance Co.*, 718 F.2d 955, 957 (9th Cir. 1983); *Goodman* v. *Heublein, Inc.*, 682 F.2d 44, 47 (2d Cir. 1982); *Obin* v. *District No. 9, Machinists & Aerospace Workers*, 651 F.2d 574, 583-84 (8th Cir. 1981); *Terket* v. *Lund*, 623 F.2d 29, 33-34 (7th Cir. 1980).

> be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above" (emphasis supplied).

This Court has made clear that compliance with Rule 4(a)(4) is mandatory. If a notice of appeal is filed prior to the disposition of a motion subject to Rule 4(a)(4), it is "as if no notice of appeal were filed at all" and "the Court of Appeals lacks jurisdiction to act." The Court of Appeals has no authority to waive the invalidity of a notice of appeal pursuant to the Rule. *Griggs* v. *Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982).

The motions enumerated in Rule 4(a)(4) comprise all the motions to alter or vacate a judgment that must be made no later than 10 days after the judgment is entered. A motion to alter or amend a judgment for certain specified reasons may also be made under Rule 60(b). Rule 60(b) motions are not subject to the 10-day time limit, however, and may be made within a "reasonable time" or within one year, depending on the theory advanced.

While Rule 4(a)(4) does not expressly refer to motions under Rule 60(b), the most recent decisions of the Courts of Appeals are in agreement that any motion filed within 10 days of entry which calls into question the correctness of a judgment, other than a motion pursuant to Rule *60(a)* to rectify purely clerical errors, is functionally a motion under Rule 59(e) and normally should be so treated for purposes of Rule 4(a), regardless of how it is styled. *See, e.g., Charles* v. *Daley*, 799 F.2d 343, 347 (7th Cir. 1986); *Harcon Barge Co.* v. *D&G Boat Rentals, Inc.*, 784 F.2d 665, 669-70 (5th Cir. 1986) (en banc) (Pet. 10); *Bank of California* v. *Arthur Andersen & Co.*, 709 F.2d 1174, 1176 (7th Cir. 1983) (Pet. 9); *Venable* v. *Haislip*, 721 F.2d 297, 299 (10th Cir. 1983) (Pet. 9); *Vreeken* v. *Davis*, 718 F.2d 343, 345 (10th Cir. 1983) (Pet. 9); *Lyell Theatre Corp.* v. *Loews Corp.*, 682 F.2d 37, 41 (2d Cir. 1982) (Pet. 10); *Dove* v. *Codesco*, 569 F.2d 807, 809 (4th Cir. 1978). As explained in 9 J. Moore, *Moore's Federal Practice* ¶ 204.12[1], at 4-69 (2d ed. 1986):

> "The caption does not control . . . and a motion labeled under Rule 60(b) but filed within 10 days after the entry of the judgment is pro tanto a motion under Rule 59(b) or (e), and the appeal time runs from the date of the order disposing of the motion."

If no timely notice of appeal is filed after the disposition of such a motion, then the Court of Appeals lacks jurisdiction and any pending appeal must be dismissed. *See Harcon Barge Co.* v. *D&G Boat Rentals, Inc.*, 784 F.2d 665, 667 (5th Cir. 1986) (en banc).

This construction of Rule 4(a)(4) is essential if it is to achieve its purposes. The Advisory Committee Notes indicate that there are two reasons why the filing of a valid notice of appeal must await the disposition of motions to alter or amend a judgment made immediately after it is entered. First, it is inefficient and duplicative to commence appellate review of a judgment which is still subject to modification by the District Court. Second, a notice of appeal filed prior to the disposition of the motion would not embrace objections to that disposition and therefore could not bring the entire case before the Court of Appeals for complete and final resolution. Exactly the same consequences would ensue if a party were permitted to initiate an appeal prior to the disposition of a motion made immediately after the entry of a judgment to alter or amend it pursuant to Rule 60(b).

In this case, plaintiffs' attorneys filed a motion to alter or amend the Rule 11 judgment on March 17, 1986, within 10 days of its entry. The motion was ostensibly made pursuant to Rule 60(b)(4), but the relief requested—vacating the judgment for lack of jurisdiction—unquestionably could have been sought by a motion pursuant to Rule 59. *See Vreeken* v. *Davis*, 718 F.2d 343, 345-46 (10th Cir. 1983). Rule 59(e) "has been interpreted as permitting a motion to vacate the judgment, rather than merely change it." 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2817, at 111 (1973); *accord*, *Markert* v. *Swift & Co.*, 173 F.2d 517, 519 (2d Cir. 1949).

Litigants, especially attorneys acting on their own behalf such as plaintiffs' attorneys, should not be permitted to evade the sound principles of judicial administration expressed in Rule 4(a)(4) merely by invoking Rule 60(b) instead of the more appropriate Rule 59.

If there is any division of authority concerning the application of Rule 4(a)(4) to motions that could have been made pursuant to Rule 59 but purport to be made under Rule 60, it has no bearing on this case. The decisions referred to by plaintiffs' attorneys which hold that not all motions which could have been made pursuant to Rule 59 should be treated as such for purposes of Rule 4(a)(4) merely make clear that exceptions may be made when necessary to achieve substantial justice. In *Smith* v. *United States Parole Commission*, 721 F.2d 346, 348 (11th Cir. 1983) (Pet. 9), the Court of Appeals declined to treat a purported Rule 60(b) motion as if it were made pursuant to Rule 59 because the movant was a prisoner proceeding *pro se* and the "recharacterization of the Rule 60 motion would contravene the principle of 'substantial justice'." Similarly, in *Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F.2d 53 (2d Cir.), *cert. denied*, 429 U.S. 862 (1976) (Pet. 10), in which the refusal to recharacterize the motion resulted in the dismissal of the appeal, the Court of Appeals indicated that treating a Rule 60 motion as if it were made under Rule 59 "is at most discretionary" and under the particular circumstances of that case "would be inappropriate," *id.* at 56 n.4.

*United States* v. *1982 Sanger 24' Spectra Boat*, 738 F.2d 1043 (9th Cir. 1984) (Pet. 9), appears to reflect the same principle although the basis for that decision, in which the Court of Appeals reversed its own earlier decision over a vigorous dissent, is not readily apparent from the opinion. The court attached importance to the facts that the appellee had not disputed its jurisdiction and that the motion and appeal challenged an uncontroverted and "serious procedural irregularity" in the District Court. *Id.* at 1045-46. Neither factor is present in this case.

The Court of Appeals' dismissal of plaintiffs' attorneys' appeal is completely consistent with the view that considerations of substantial justice should be taken into account in characterizing a postjudgment motion. In fact, plaintiffs' attorneys urged the Court of Appeals to follow the discretionary approach suggested in its opinion in *Daily Mirror*, and the order dismissing the appeal provides no ground whatsoever for believing that it did not do so. Plaintiffs' attorneys are not *pro se* litigants who arguably followed a legitimate procedure to challenge the judgment for sanctions. It is a matter of record that they attempted to burden the courts and respondents with completely unnecessary simultaneous proceedings in the District Court and Court of Appeals—precisely the sort of wasteful duplication Rule 4(a)(4) was intended to prevent—and that this procedure represents their deliberate and long standing *modus operandi*.

The decisions to which plaintiffs' attorneys refer can hardly be said to create a "trap for the unwary" (Pet. 9) because they, like all other decisions of the Courts of Appeals, recognize that the party's characterization of a postjudgment motion is not controlling for purposes of applying Rule 4(a)(4). *See*, in addition to the citations in the carry-over paragraph at pages 7-8 above, *United States* v. *1982 Sanger 24' Spectra Boat*, 738 F.2d 1043, 1046 (9th Cir. 1984); *Smith* v. *United States Parole Commission*, 721 F.2d 346, 348 (11th Cir. 1983); *A.D. Weiss Lithograph Co.* v. *Illinois Abrasive Products Co.*, 705 F.2d 249, 250 (7th Cir. 1983); *Daily Mirror, Inc.* v. *New York News, Inc.*, 533 F.2d 53, 56 (2d Cir.), *cert. denied*, 429 U.S. 862 (1976). No attorney familiar with these decisions would fail to file a notice of appeal following the disposition of any postjudgment motion that could have been made pursuant to Rule 59.

Plaintiffs' attorneys' predicament is not the result of any procedural trap, but of their practice of burdening the courts and respondents with duplicative and repetitious proceedings. Their attempt to proceed simultaneously in two courts reflects an all-too-well established pattern of deliberate multiplication

of proceedings, not an innocent misreading of the rules. The attempted appeal related solely to the amount of the sanctions to be imposed against the same attorneys who were responsible for the improper procedure. No innocent party has been prejudiced on account of their misconduct.

## II.

## THE COURT OF APPEALS' DETERMINATION THAT THE STIPULATION WITHDRAWING THE INVALID APPEAL DID NOT CONSTITUTE A NOTICE OF APPEAL

Even the most liberal construction of Rule 3 of the Federal Rules of Appellate Procedure cannot sustain plaintiffs' attorneys' contention that they filed a notice of appeal within the 30-day period after the District Court entered its order denying the motion to vacate the Rule 11 judgment. As plaintiffs' attorneys acknowledge (Pet. 11), that period began on April 16, 1986. The only paper filed in this action during the following 30 days was a stipulation and order in the Court of Appeals *withdrawing*, subject to reinstatement, the supposed appeal taken by the notice improperly filed on March 31 (Pet. 17a).

The authorities relied upon by petitioners make clear that the requirement of Rule 3 concerning the filing of a notice of appeal requires even a nonlawyer, *pro se* litigant to make "a positive, substantial and unequivocal effort to discharge it," *Alley* v. *Dodge Hotel*, 501 F.2d 880, 884 (D.C. Cir. 1974) (Pet. 13), and this requirement is hardly satisfied by the accident that petitioners *withdrew* an improperly noticed appeal at the time when they should have been filing a proper notice. Even if there were room for doubt on this point, the Court of Appeals' application of Rule 3 to the particular facts of this case does not merit review by this Court.

## CONCLUSION

The petition should be denied.

Respectfully submitted,

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February 6, 1987

## APPENDIX

### Designation of Corporate Relationships

Pursuant to Rule 28.1 of this Court, respondents submit this designation of corporate relationships.

1. Respondent Anaconda-Ericsson Inc. has been renamed Ericsson, Inc. It is a wholly-owned subsidiary of Ericsson North America Inc., which in turn is a wholly-owned subsidiary of L M Ericsson Telephone Company, a Swedish corporation whose shares are publicly held. L M Ericsson Telephone Company has subsidiaries throughout the world, but none of their shares are publicly traded in the United States.

2. Since the commencement of this action, the corporate name of respondent Nordic American Banking Corporation has been changed to DnC America Banking Corporation. DnC America Banking Corporation is wholly owned by Den norske Creditbank, a Norwegian corporation.

3. None of the other parties named as respondents have any interest in the petition. *See* page 2 n.1, *supra*. The corporate relationships of the corporations improperly named as respondents are set forth in the brief in opposition to the first petition for certiorari in this case, no. 86-598.

(3)

No. 86-922

Supreme Court, U.S.
FILED
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In The

# Supreme Court of the United States

October Term, 1986

MICHAEL M. RAND, JOHN COSTELLO, STEVEN J. COSTELLO, GREGORY T. FRESE, EDWARD LAVIN, PETER A. MILANO & VINCENT F. SERVELLO,

*Petitioners,*

v.

ANACONDA-ERICSSON, INC., ERICSSON, INC., L.M. ERICSSON TELEPHONE COMPANY, NORDIC AMERICAN BANK, CITIBANK, N.A., PRICE-WATERHOUSE & CO., SULLIVAN & CROMWELL, RICHARD HOWE, RICHARD G. LYON, L. STANTON TOWNE, TELECOM EQUIPMENT CORP. & STEPHEN R. COHEN,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## REPLY BRIEF

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*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

## REPLY BRIEF

Petitioners-attorneys respectfully file this brief in reply to the brief of respondents filed in opposition to the petition for a writ of certiorari to review the order of a motion panel of the Court of Appeals for the Second Circuit, dated September 2, 1986, dismissing petitioners-attorneys' appeal from a second final judgment entered in this case on March 7, 1986.

## STATEMENT

Respondents, in their brief in opposition, attempt to obscure the denial of petitioners-attorneys' right to an appeal in this case by emphasizing, as proof of a purported lack of innocence on petitioners-attorneys' part, the very allegations of "bad faith" litigation concerning which petitioners-attorneys sought—and were denied—appellate review in the Court of Appeals. Respondents are aided in this effort by the decision of the Second Circuit panel in this case, 794 F.2d at 850 which, while it emphatically declares that the issue of sanctions is not before it, nonetheless affirms, without explanation, the entry of an injunction against plaintiffs and petitioners-attorneys for bad faith litigation, an injunction which is itself part of the sanction awarded against petitioners-attorneys by the District Court. In other words, petitioners-attorneys have been found liable for bad faith litigation by the Court of Appeals even though the issue has ostensibly never been passed upon by that body.

The District Court itself, on the other hand, never held that the present action was commenced in bad faith. On the contrary, it held that plaintiffs' opposition to respondents' motion for summary judgment became objectionable only after the Court of Appeals, in a companion case, 762 F.2d 185 (2d Cir. 1985), had affirmed the dismissal of plaintiff Edward Beagan's claims on *res judicata* grounds.[1]

---

1. The District Court held that opposition to respondents' summary judgment motion was unjustified despite the fact that the Court of Appeals in the *Beagan* case had made it plain that only Beagan, as a "privy" of Teltronics, was bound by *res judicata*. ("We take care to point out that we hold only that Beagan . . . is bound by the adverse decisions as to the cause of action asserted in the previous suits"). 762 F.2d at 193.

Hence the impression that respondents are now attempting to create that the instant case is only the "last gasp" in a "protracted litigation" involving the same "cause of action" espoused in prior actions, including bankruptcy proceedings, is entirely and deliberately false and misleading.

This is in fact the first time the plaintiff-shareholders in this case have come to court seeking damages both for themselves and for the other defrauded Teltronics' shareholders. Indeed, the District Court explicitly conceded that *res judicata* was not an issue in the case. 623 F.Supp. at 189. The record demonstrates that plaintiffs, as shareholders with individual losses, have sued once and only once for the harm they suffered at respondents' hands and the facts presented in the litigation—never denied by respondents—fully support the allegations in their complaint.[2] Hence, no evidence of bad faith exists factually or legally.

Respondents' further contention that, in attempting to appeal the dismissal of their case and the entry of an injunction against them, plaintiffs and their attorneys were somehow attempting to institute "simultaneous proceedings" in the District Court and the Court of Appeals is

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2. The complaint charges respondents with the intentional destruction of plaintiffs' stock interest in Teltronics as part of an illegal takeover scheme which included bribery and the manipulation of the national securities markets in violation of the RICO statute and federal securities and antitrust law. The complaint charges that respondent Ericsson was involved in similar schemes in connection with the debt takeovers of its Miami, Boston and Philadelphia subsidiaries. Recent press reports serve to confirm plaintiffs' allegations of a "pattern" of such illegal activity. See Appendices A through D.

patently ludicrous. Plaintiffs' appeal from the District Court's injunction was "as of right" and respondents' attempt to dismiss that appeal was denied by the Court of Appeals. Prior to the denial of their motion, however, respondents exerted every effort to prevent an appeal by plaintiffs to the Court of Appeals, including requesting the District Court immediately to enter a judgment for $70,000 directly against petitioners-attorneys on grossly inflated papers, attempting to intimidate plaintiffs' lawyers with the prospect of immediate execution of that second "judgment", and by simultaneously requesting the lower court to direct the filing of a supersedeas bond in the amount of 110% of the proposed $70,000 "judgment" as a condition precedent to plaintiffs taking their appeal.

## ARGUMENT

### I.

### ENTRY OF THE SECOND FINAL JUDGMENT WAS NOT COLLATERAL TO THE MERITS OF THE CASE

The issue of the award of sanctions against petitioners-attorneys is clearly not "collateral" to the substantive action, as respondents contend. The award of sanctions (and the entry of an injunction against plaintiffs and their attorneys) was appealed by plaintiffs in connection with the first "final" judgment entered in the case. Jurisdiction over the case was immediately transferred to the Court of Appeals upon the filing of a notice of appeal "with respect to *any matters* involved in the appeal." *G & M, Inc. v. Newbern*, 488 F.2d 742, 746 (9th Cir. 1973), (quoting 9 J. Moore, *Moore's Federal Practice*, § 203.11 (2d

ed. 1986) (emphasis added). See also, *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982). Respondents' motion to dismiss the appeal on the ground that it was prematurely filed was, as noted, denied by the court.[3]

It is self-evident that the considerations that were necessary to sustain the second final judgment, are the same considerations used to evaluate the appeal from the first final judgment, *i.e.*, the question of whether and to what extent the litigation was conducted in bad faith. Accordingly, the District Court clearly had no jurisdiction to consider the amount of sanctions to be awarded after notice of appeal from the first final judgment—which involved the sanctions issue—had been served and filed.

The cases cited by respondents on page 6, footnote 3, of their brief in opposition, all concern or follow cases concerning fee awards under 42 U.S.C. Section 1988 or 42 U.S.C. Section 2000e-5(k). In these fee requests, the merits of the underlying actions were not in question. That is not the case here. Here the validity and amount of the award for alleged bad faith are inextricably intertwined. In *Wright* v. *Jackson*, 522 F.2d 955 (4th Cir. 1975), for example, the Fourth Circuit held that "insofar as a court's measure of a party's obstinacy depends on the nature of the case, it must make that assessment while the merits are before it, either prior to an appeal or on remand after they have been settled." 522 F.2d at 958. That is the rule which should have been applied here. See also, *Nichol* v.

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3. The *G & M* case details three exceptions to the prohibition of district court jurisdiction during appeal. These are (1) orders in aid of appeal; (2) corrections of clerical errors; and (3) orders in aid of execution of a judgment, 488 F.2d at 746. None of these exceptions is present here.

*Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298 (5th Cir. 1984) (once an appeal is taken from a judgment which determines an entire action, the District Court loses power to take any further action in the case); *Main Line Fed. Savings & Loan Ass'n* v. *Tri-Kell, Inc.*, 721 F.2d 904 (3rd Cir. 1983) (once an appeal is taken, the lower court retains only such jurisdiction as is necessary to aid the higher court in consideration of the appeal); see also, 9 J. Moore, *Moore's Federal Practice*, § 203.11 (2d ed. 1986).

## CONCLUSION

The petition should be granted.

Respectfully submitted,

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## APPENDIX A

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Perhaps buying prostitutes for potential customers is not an uncommon big business practice, but it's big news when you get caught, as LM Ericsson Telephone Co. found out last week. The Stockholm press had a field day with a story alleging that Ericsson provided hookers at a party for Arthit Kamlang-ek, military Supreme Commander and chairman of the board of the PTT of Thailand—a key Far East Ericsson customer. And the kicker is that while the party was going on, Kamlang-ek was missing a military coup back home. Although Ericsson denied any direct involvement, it acknowledged that over-zealous Ericsson salesmen in town from Thailand for the general's visit might have "indirectly involved" the company. A spokesman said Ericsson was "very embarrassed" by the episode. "If our money was used, it was without our knowledge, but it is still our responsibility. It is far from our way of doing business. We must see that every part of our business is clean."

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## ERICSSON RUNS INTO TROUBLE IN COLUMBIA

**JOHN WILLIAMSON, INTERNATIONAL EDITOR**

Sweden's LM Ericsson has run into problems in Columbia in its efforts to secure an $8 million contract to supply AXE digital central offices. Following local reports of irregularities and bribery, the ratification of the contract has been postponed, pending an official inquiry.

A senior LM Ericsson executive in Stockholm said the company would appeal against the postponement, and added, "we know we will come out of this without problems."




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APPENDIX B

TELEPHONY MAG. 12/29/86, p. 16

## APPENDIX C

*THE WALL STREET JOURNAL*

1-22-87 p. 34

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### *Venezuela Official Is Asked To Investigate Ericsson*

*Special to* THE WALL STREET JOURNAL

CARACAS, Venezuela—The president of Venezuela's congress officially requested that the attorney general investigate allegations that L.M. Ericsson Telefon AB bribed Venezuelan officials.

In Stockholm, a spokesman for the Swedish telecommunications company rejected the allegations as "completely groundless." He cited a company policy that forbids the payment of bribes and said Ericsson welcomes the investigation.

A Venezuelan congressional committee already is studying the bribery charges in connection with a pending $186.6 million contract for telephone equipment that was awarded by the state telephone company, Cantv, last year to Ericsson, Nippon Electric Co. of Japan and Siemens AG of West Germany.

The charges arise from investigations by the Bogota, Colombia, newspaper El Tiempo since November regarding $3.8 million in alleged bribes paid to Colombian and Venezuelan officials. El Tiempo reported that Ericsson paid nearly $2 million to an unidentified high-level Venezuelan politician between 1978 and 1980.

The congress's president, Reinaldo Leandro Mora, said: "We have urgently requested the attorney general to open an exhaustive and detailed investigation of the activities in Venezuela of Ericsson that could lead to the establishment of legal responsibilities."

APPENDIX D

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# *Secrets Police*

# Neutral Nations Guard American Technology To Gain Import Rights

## U.S. Lets Sweden and Others Get Export Licenses Fast If Leaks to Soviets Stop

## Ericsson Negotiates a Bargain

By EDUARDO LACHICA
*Staff Reporter of* THE WALL STREET JOURNAL

WASHINGTON – Swedish industrialist Peter Wallenberg acted quickly to minimize the damage after the U.S. charged two of his multinational companies with illegally transferring U.S. technology to the Soviet bloc.

He retained former Secretary of State Henry Kissinger and Edward Bennett Williams, the noted criminal lawyer, to defend his interests. His companies, L.M. Ericsson AB and ASEA AB, stood to lose millions of dollars of business if the U.S. government made it harder for them to import American products for their manufacturing operations around the world.

He also lobbied hard in both Stockholm and Washington for a bargain that the U.S. and Sweden eventually struck – closer Swedish vigilance against illegal diversion of U.S. technology, in exchange for continued access to U.S. high-technology components.

The U.S.-Swedish accord, which was negotiated quietly in 1981 and 1982, has become the model for similar arrangements with some other neutral countries – Austria, Switzerland and, more recently, Singapore. India may eventually follow suit. These unwritten agreements, which require neutral countries to do a better job of policing their trade, are designed to make it harder for the Soviets to circumvent curbs on the transfer of U.S. technology that has military applications.

### How It Works

"This is one of the great untold stories of our times – how the need for U.S. technology is driving neutral countries to cooperate with us," says Paul Freedenberg, the assistant secretary of commerce for trade administration.

(The U.S. also will ask Allies to urge neutral nations to keep strategic goods out of Soviet hands. See article on page 20)

The bargain certainly has worked well for both the U.S. and Sweden. A cabinet ordinance that Sweden put into effect last June extends U.S. controls to American products imported by Swedish nationals – and by definition to a lot of locally produced goods as well if they have components of U.S. origin.

As a reward for Swedish cooperation, U.S. export-licensers treat Ericsson and ASEA as generously as they do importers from Allied countries, with which the U.S. has formal agreements on export controls. That is an invaluable privilege. Getting U.S. export licenses on time can mean the difference between winning or losing an order for, say, a telephone switching system or factory automation layout that needs an IBM computer.

### Bloc Trades

As a consequence, the U.S. has been able to pull Sweden deeper into its economic sphere and away from the Soviet Union. Since 1981, Sweden's investments in the U.S. have grown 69% and its yearly exports to the U.S. have more than doubled to $4.3 billion. In 1985 the U.S. surpassed West Germany as a buyer of Swedish goods and became Sweden's largest overseas market.

The new business climate partly reflects changes that have taken place since the Justice Department in 1981 charged that Datasaab Contracting AB had violated U.S. export-control laws by sending the Soviets $3.1 million in U.S. computers and software that could permit tracking of military as well as civilian aircraft. The violation would have made Datasaab, a computer-software company later absorbed by

# Secrets Police: Neutral Countries Agree to Guard U.S. Technology

Mr. Wallenberg's L.M. Ericsson, liable for criminal prosecution in the U.S.; potential penalties included fines of up to five times the value of the U.S. products involved and—the most severe of all penalties for Ericsson—denial of subsequent U.S. high-tech products.

Shortly after the Datasaab case was brought, the U.S. charged that ASEA, a Wallenberg heavy-machinery and electrical manufacturer, had illegally shipped nine computers to the Soviet Union and Czechoslovakia during the two preceding years.

## Appeal to Commerce Chief

The only thing Mr. Wallenberg says about these cases is that "it took a long time to settle them." From 1981 to 1985 he made frequent trips to Washington, often with ASEA President Percy Barnevik. At a meeting with Commerce Secretary Malcolm Baldrige in 1982, he made a strong plea for his companies and vowed that they would handle their trade more scrupulously. Mr. Baldrige doesn't want to talk about his dealings with Mr. Wallenberg or his role in winning tougher technology-policing procedures from Sweden and some other neutral countries. "The less said, the better," the commerce chief remarks.

It is clear, though, that Mr. Wallenberg began a two-track effort to protect his companies' ability to ship products using advanced American technology. He worked hard to soften penalties against his companies and began an effort to convince the Swedish government that helping the U.S. police curbs on technology exports was in Sweden's interest.

The U.S. was anxious to close Sweden as a conduit for technology smuggling. In

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1981, Defense Secretary Caspar Weinberger offered Sweden the blueprints of a state-of-the-art General Electric Co. jet engine and other aerospace technology from Lear Siegler Inc., Teledyne Inc. and Honeywell Inc. if the Swedes would tighten their export controls. Sweden badly needed this equipment for the development of its new fighter-bomber, the JAS 39 Gripen, and eventually Washington and Stockholm reached an agreement.

In Sweden, Mr. Wallenberg worked to convince other businessmen that their interest, too, lay in cooperating with the U.S. When two Pentagon officials in charge of export-control policy, Richard Perle and Stephen Bryen, were in Sweden in 1982, Mr. Wallenberg invited them to his house to address a group of business leaders over dinner. According to Mr. Bryen's account, Mr. Perle was very direct about the U.S. desire to stop leaks of U.S. technology through Sweden, telling the businessmen: "We have a serious problem—serious enough to make us very tough even with a country like Sweden, which has been a good friend."

On his many trips to Washington, Mr. Wallenberg, a pro-West conservative, was fighting what he thought to be an anti-Swedish bias. He bristles at what he sees as an American notion of Swedes as self-indulgent socialists and welfare-staters. "Why, 90% of the Swedish GNP is produced by the private sector," he says. He retained Mr. Kissinger to advise Ericsson and ASEA on Washington policy.

Mr. Bryen says an understanding was first struck with Prime Minister Thorbjorn Falldin's conservative government in 1981-82. The Falldin government was shortly afterward replaced by that of the late Olof Palme and his Social Democrats, who, despite initial reluctance, subsequently adopted the Falldin deal.

But the Social Democrats began cooperating with the U.S. long before the cabinet adopted an export-control ordinance last year. In November 1983 Swedish customs, acting on the request of the U.S., stopped three containers of diverted U.S. computer parts from leaving the free port of Helsingborg for a Soviet destination—despite the lack of clear-cut laws to justify that action.

In April 1984 Mr. Williams, the lawyer Mr. Wallenberg had retained to represent Ericsson, won a favorable settlement for the firm. Ericsson agreed to pay a $3.1 million fine, the stiffest ever levied against a company for export-control violations; but Ericsson avoided a Commerce Department denial of export privileges, a penalty that usually accompanies infractions of this kind. In a U.S. court hearing, Mr. Williams had argued that export denial would have been a "lethal, devastating blow to a company that relies so heavily on its ability to do business in the U.S."

Moreover, the settlement averted a punitive breach-of-contract suit by the Soviets. It recognized Ericsson's right to complete some of its work for the Soviet air-traffic system, and the company thus remained eligible to claim a large part of the $75 million that the Soviets had offered to pay for the system.

ASEA also got off light. The Commerce Department fined it $440,000 in May 1985 but didn't disturb its export privileges. The ASEA executive responsible for selling the computers in violation of U.S. laws was convicted of tax evasion in Sweden, but not of technology piracy.

Out of all this emerged the Pentagon's plan to recruit neutral countries as unofficial associates in policing technology transfers. As Mr. Bryen describes it, the plan has three stages.

First, get the neutral countries to protect U.S. technology that they import for their own use. All the European neutral nations and most major Asian buyers of U.S. technology now unhesitatingly do this.

Second, get them to prevent sensitive U.S. products passing through their free ports, duty-free zones and bonded warehouses from being illegally diverted by third parties. Switzerland and Sweden introduced tougher in-transit restrictions early last year. Austria has promised to adopt similar rules in a few months.

Third, talk these neutrals into denying the Soviet bloc high-tech products that they manufacture themselves. This is a tougher request for the neutral nations to swallow, but Mr. Bryen asserts that the U.S. has had "good success" even in this matter. "We have persuaded them not to ship lasers, computers, aircraft parts and other stuff to the Soviets," he says.

The Wallenberg companies are pulling out of Soviet-bloc trade, although they say they are doing so mainly for economic reasons. "It's a lackluster market," says Lars Thunnell, ASEA's executive vice president. "Our business with them has been declining over the last few years."

Franklin Forsberg, the U.S. ambassador to Stockholm when the export-control arrangements were negotiated, says Mr. Wallenberg is simply following the wisdom of his late father, Marcus Wallenberg, the noted Swedish financier and industrialist. "Marcus," he says, "knew that a country with only eight million people and a highly developed industry could only find growth in export markets like the U.S."